No. 89-541

Supreme Court, U.S.
FILED
SEP 11 1989
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EDWARD NEDZA,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner, an Illinois State Senator, was convicted of Hobbs Act extortion under color of official right based on his own financial investment in a local business. The business' owner testified that three public officials, including Petitioner, asked to invest in the business. The business owner testified that he allowed the officials to invest $10,000 of their own money so that he would not have any problems in the neighborhood when he opened the business. The business owner also testified that, during his business relationship with Petitioner, Petitioner's position as a state senator "never came up," and that he never asked Petitioner to take or not take any action that the business owner believed were part of Petitioner's duties as a state senator. The business owner testified that he did not believe that the public officials could close the business if they were not satisfied with their investment. The questions presented are:

1. Does the Hobbs Act offense of extortion under color of official right require proof that the extortion "victim" actually believed that the public official, in exchange for property, would take or not take some action within the scope of his duties?

2. Is affirmative inducement an essential element of the Hobbs Act offense of extortion under color of official right?

PARTIES TO THE PROCEEDINGS

Petitioner, Edward Nedza, was defendant-appellant before the United States Court of Appeals for the Seventh Circuit. Respondent before this Court, the United States of America, was plaintiff-appellee below and commenced the prosecution against Petitioner.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	i
TABLE OF AUTHORITIES	iii-iv
OPINION BELOW	1
JURISDICTION	2
PERTINENT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2-9
REASONS FOR GRANTING THE WRIT	
I. This Court Should Resolve the Uncertainty In Prosecutions for Extortion Under Color of Official Right Concerning Whether the Government Must Prove that the Extortion "Victim" Believed That the Public Official Would Take Official Action in Exchange for Property	9-16
II. This Court Should Resolve The Split In The Circuits Over Whether the Hobbs Act Requires Proof That the Public Official Affirmatively Induced Payments from the Extortion "Victim"	16-19
CONCLUSION	20
APPENDIX	A-1 - A-16

TABLE OF AUTHORITIES

	PAGE
McNally v. *United States*, ___ U.S. ___, 107 S.Ct. 2875 (1987)	19
United States v. *Adcock*, 558 F.2d 397 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977)	17
United States v. *Aguon*, 851 F.2d 1158 (9th Cir. 1988) (en banc)	15, 18, 29-31
United States v. *Bibby*, 752 F.2d 1116 (6th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986)	14
United States v. *Blackwood*, 768 F.2d 131 (7th Cir.), *cert. denied*, 474 U.S. 1020 (1985)	14
United States v. *Bucci*, 839 F.2d 825 (1st Cir. 1988)	12
United States v. *Butler*, 618 F.2d 411 (6th Cir.), *cert. denied*, 447 U.S. 927 (1980)	17
United States v. *Dozier*, 672 F.2d 531 (5th Cir.), *cert. denied*, 459 U.S. 943 (1982)	17
United States v. *Garner*, 837 F.2d 1404 (7th Cir. 1987), *cert denied*, 108 S. Ct. 2022 (1988)	14, 16
United States v. *Hall*, 536 F.2d 313 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976)	15
United States v. *Holzer*, 816 F.2d 304 (7th Cir.), *vacated and remanded on other grounds*, 108 S.Ct. 53 (1987)	14, 17
United States v. *Janotti*, 673 F.2d 595 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982)	17
United States v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983)	13
United States v. *Martin*, 751 F.2d 258 (8th Cir. 1984)	14
United States v. *Mazzei*, 521 F.2d 639 (3d Cir.), (en banc), *cert. denied*, 423 U.S. 1014 (1975)	13
United States v. *Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986)	17

	PAGE
United States v. *O'Grady*, 742 F.2d 682 (2d Cir. 1984) (en banc)	17, 18
United States v. *O'Keefe*, 825 F.2d 314 (11th Cir. 1987)	15, 16
United States v. *Paschall*, 772 F.2d 68 (4th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986)	13
United States v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979)	14
United States v. *Spitler*, 800 F.2d 1267 (4th Cir. 1986)	17
United States v. *Swift*, 732 F.2d 878 (11th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985)	17
United States v. *Wright*, 797 F.2d 245 (5th Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987)	13

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PRAYER

Petitioner Edward Nedza respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in this case on July 12, 1989.

OPINION BELOW

The opinion of the Court of Appeals is not yet published in the official reporters; the court's slip opinion is attached hereto at Appendix A.

JURISDICTION

On July 12, 1989, the United States Court of Appeals for the Seventh Circuit affirmed Petitioner's conviction.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

PERTINENT STATUTORY PROVISIONS

Section 1951(a) of Title 18 of the United States Code provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this Section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

Section 1951(b)(2) provides:

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

Petitioner Edward Nedza was charged with one count of racketeering (involving Hobbs Act extortion and state bribery), one count of conspiracy to commit Hobbs Act extortion, six counts of Hobbs Act extortion, and four counts of filing false income tax returns (R. 50).[1] The indictment charged

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[1] References to the record on appeal, except for the transcript of trial proceedings, will be "R. ____." References to the trial transcript will be "Tr. ____."

that the extortion conspiracy extended from 1980 to 1986 and also involved Benedict Garmisa and Chester Kuta. Garmisa died before the return of the indictment (Tr. 303); Kuta pleaded guilty to misdemeanor charges not involving extortion and did not testify against Petitioner.

During the period of time pertinent to the indictment, Petitioner was the State Senator in the Illinois General Assembly from the Nineteenth (now Fifth) Senatorial District, which encompasses the 31st Ward in Chicago, Illinois (Tr. 848). Petitioner also was the Democratic Ward Committeeman for the 31st Ward (Tr. 851).[2] From 1980 to 1982, Garmisa was a State Representative from the district that included the 31st Ward (Tr. 298). In 1980 and 1981, Kuta was the Alderman representing the 31st Ward in the Chicago City Council (Tr. 298-99).

Leonard Kraus, the government's chief witness, owned several businesses in the 31st Ward (Tr. 293-94, 483-86, 489). In early 1980, Kraus and his brother decided to open a flea market (a large open area with numerous individual vendor stalls offering a wide variety of merchandise for sale) in the 31st Ward (Tr. 299). Kraus testified that he wished to have the blessings of the neighborhood politicians before opening the flea market (Tr. 299-300). Kraus admitted that he had operated numerous other businesses in the 31st Ward, including one he started in 1982 or 1983; Kraus admitted that he never, before or after, had sought or received the blessing of neighborhood politicians, and that no politician, including Petitioner, ever caused problems with his other businesses (Tr. 489-92).

A friend of Kraus introduced him to Garmisa, and Kraus told Garmisa that he wanted to open a flea market in the ward

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[2] The trial court ruled that a ward committeeman is not a public official under Illinois law for purposes of the Hobbs Act (Tr. 882-83). The Court of Appeals noted that the Hobbs Act charge was predicated solely upon Petitioner's position as a state senator. *See Nedza*, slip. op. at 11 n.12.

(Tr. 298, 301). Kraus also told Garmisa that he wanted to know if it would be all right with the "powers to be" in the ward, and that he wanted to know if Kraus would have any problems after he opened since flea markets had not been tried in Chicago (Tr. 301). Garmisa replied that he would discuss it with Petitioner and Kuta and that Garmisa wished to invest in the flea market (Tr. 301).

In a later conversation, Garmisa told Kraus that he had talked to Petitioner and Kuta and that it was all right with them (Tr. 302). Garmisa asked Kraus to consider allowing Garmisa and Petitioner to be partners in the flea market (Tr. 302). Kraus replied that he and his brother had never had partners and did not need partners (Tr. 302). Garmisa responded that they should talk about it later (Tr. 302).

Kraus testified that he and his brother decided to make a token offer so that they would not have any problems in the ward when they tried to open the business (Tr. 303). Kraus offered Garmisa and Petitioner twenty percent of the stock in the flea market (Tr. 303). Kraus testified that Garmisa and Petitioner said that twenty percent was unacceptable, but that fifty percent would be acceptable (Tr. 303-04). Later, Kraus agreed to offer Garmisa and Petitioner fifty percent of the stock (Tr. 305-06). Kraus testified that, in exchange for the fifty percent investment, Garmisa and Petitioner (and later Kuta) would take care of any problems Kraus had in the ward (Tr. 308-09).

The total investment in the flea market was $20,000 (Tr. 306, 309). Kraus and his brother paid in $10,000; Petitioner and Garmisa invested $4,000 each, representing twenty percent shares in the business; and Kuta contributed $2,000, representing a ten percent share (Tr. 306, 341-45). Petitioner's $4,000 investment was designated as $200 for 200 shares of stock and $3,800 as a loan to the business (Tr. 927-28). Petitioner's stock was listed in his wife's name and Garmisa and Kuta listed their stock in their daughter's names (Tr. 308, 324).

During 1981 and 1982, Kraus made payments in check and in cash to the investors (Tr. 309-12). On most occasions Garmisa would call Kraus and ask for a distribution of profits (Tr. 467-86). Kraus alone would decide if a payment would be made and in what amount. Kraus would get money out of the business, put cash in three envelopes, and distribute the money. The money was paid out in accordance with the percentage of stock owned (Tr. 319, 320, 464, 577). Kraus testified that he kept a record of the cash payments; that record reflected nine cash payments from April 21, 1981 through October 13, 1982, totalling $10,740 to Petitioner, $10,740 to Garmisa and $5,370 to Kuta (Tr. 315-19).

Kraus testified that the public officials did nothing for their cash payments (Tr. 320). Kraus testified that he asked the officials for assistance concerning five matters: a notice from the fire department; a traffic light near the flea market; parking signs near the flea market; notices from city electrical inspectors; and a problem with the zoning of the flea market.

Kraus asked Garmisa to handle the notice from the fire department, but nothing was done so Kraus called the fire department himself (Tr. 320-25). In 1981, Kraus asked Garmisa and Nedza to change the traffic light to a shorter red light to avoid traffic congestion on the weekends and Kraus testified that the timing of the light was changed.[3] (Tr. 325-27).

Kraus testified that he also asked Garmisa, Petitioner and Kuta to get some parking signs changed to allow more parking for customers near the flea market (Tr. 327-28). Kraus

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[3] This testimony was refuted by a member of the City Traffic Department, who testified that city records reflected that the lights had been designated flashing red and flashing yellow on weekends since they were put in and no one had requested a change in its flashing pattern on weekends (Tr. 707-14). The government later introduced evidence from an FBI agent that at the time of the trial in 1987 the light was a normal cycle red and green light on Saturday. (Tr. 1106).

testified that, although all three said they would look into it, nothing was done about the parking signs (Tr. 328-29).

In late 1981 Kraus began having problems with the electrical inspectors (Tr. 329). He asked Garmisa, Petitioner and Kuta to help and told Petitioner he wanted to do the necessary rewiring work but needed a permit (Tr. 329-30). Petitioner told Kraus he would have to comply with safety and building codes (Tr. 418). Petitioner introduced Kraus to a Mr. Balter, who took Mr. Kraus to the city electrical department to learn how to get a permit (Tr. 419, 468). Kraus was unable to get the permit (Tr. 329-33). Eventually, Kraus found out he could not get the permit because the property was not zoned properly (Tr. 33). He talked to Garmisa, Petitioner and Kuta, but they did nothing about the problem, although Kraus told them the building would be closed if he did not get the zoning.[4] (Tr. 334-35, 346-48, 425-26, 428).

Kraus admitted that he never asked Petitioner to do anything with respect to Petitioner's position as state senator (Tr. 578-79). Kraus admitted that Petitioner's position as state senator "never came up" in Kraus' dealings and conversations with Petitioner (Tr. 579).

Kraus did not testify that he allowed Petitioner to invest in the flea market or wanted Petitioner's "blessing" of the flea market *because* Petitioner was a state senator. Kraus did not testify that he believed that Petitioner would take action, either official action or action that Kraus believed to be within Petitioner's power as a state senator, that would affect the flea market.

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[4] To resolve the electrical permit and zoning problems, Kraus eventually sought help from another businessman who had connections with various city employees and other public officials (Tr. 348-51). Kraus paid approximately $24,500 to the businessman to solve the permit and zoning problems (Tr. 348-52). Some of the money was passed on to a city inspector, a judge, and an alderman (not Kuta) (Tr. 349-52, 436). The record is somewhat unclear as to which problems were resolved by the payment of the $24,500. Petitioner was not involved in resolving these problems.

Although Kraus testified that he asked Petitioner and the other officials for assistance, Kraus never testified that any of the requests fell within what Kraus believed to be Petitioner's powers as a state senator. And, although Kraus said that he did not want Petitioner as an investor, Kraus never testified that he believed that Petitioner, as a state senator, would attempt to close the flea market if he were not allowed to invest. In fact, Kraus testified that he did not think that the three public officials could have closed the flea market (Tr. 588).

Petitioner and Illinois State Senate President Phillip Rock provided the only evidence concerning the official duties of state senators. Both men testified that the official functions of a state senator have nothing to do with the regulation of flea markets, Chicago parking signs, traffic lights, zoning, or building, fire, or electrical inspections (Tr. 848-50, 1028-30). Senator Rock agreed that state senators, by virtue of their official position, have a certain degree of power and influence over matters that are not directly part of their jobs as state senators.[5] (Tr. 1033).

Kraus testified that in 1984 the public officials suggested that Kraus buy out their shares because he was no longer distributing profits (Tr. 356, 534-37). Garmisa asked for $30,000 for his share, $30,000 for Petitioner's share and $15,000 for Kuta's share, in addition to repayment of the loan (Tr. 537). However, Kraus counter-offered to pay and eventually paid only $12,000 each to Petitioner and Garmisa and $6,000 to Kuta for their share and the loan (Tr. 538-42). The price was agreeable to Petitioner, Garmisa and Kuta, the stock was sold, and the money was paid through a lawyer-escrowee over a period of eighteen months (Tr. 538-42, 549-50).

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[5] Although the opinion below reports that Senator Rock testified that "state senators exercise *enormous* influence in areas outside the scope of their traditional duties," *Nedza*, slip op. at 12 (emphasis added), that purported attribution to Senator Rock does not appear in the record.

Petitioner testified that Garmisa originally told him that Kraus was looking for investors (Tr. 855). In a subsequent meeting with Kraus, Kraus asked for a $20,000 investment and it was then reduced to a $10,000 investment. Petitioner discussed the matter with his wife, they went to look at the flea market building, and they decided to make the investment. He put the investment in her name because he traveled frequently, and he wanted her to have her own income without being involved in a court fight if something were to happen to him (Tr. 858-59). In May of 1980, Petitioner invested $2,500 in a check signed by him and written on his account. In September of 1980 Kraus asked for more money and Petitioner again gave Kraus a personal check, signed by him, in the amount of $1,500 (Tr. 861-62).

Petitioner admitted receiving payments from Kraus in check and cash. Petitioner testified that it was Kraus who decided to make the payments in cash, saying it was easier for him because the flea market was a cash business (Tr. 863-64). Petitioner kept a list of the payments that was not significantly different from Kraus' list, with a difference of approximately $500 between his list and Kraus' list (Tr. 871-74, 895-96). Petitioner testified that he never asked for any money and the distributions always were Kraus' decision and made in proportion to shares owned (Tr. 875). As to the sale, Petitioner testified that he was first told by Garmisa that Kraus would purchase their shares (Tr. 874). Kraus set the price for the sale and Petitioner did not see a financial statement of the business in 1984 in relationship to the sale (Tr. 876).

After Kraus began cooperating with the government, he secretly tape-recorded a conversation with Petitioner (Tr. 365). In the tape, Kraus told Petitioner that he [Kraus] did not need investors, he only needed their help (Tr. 998). Petitioner's response was "yeah" (Tr. 998). Petitioner testified that the first time he knew this was Kraus' intent was when Kraus called him in 1983 to ask for help. At the time, Petitioner refused to help him. Before that 1983 telephone

conversation Petitioner believed that Kraus needed investors based on what Garmisa told him and based on Petitioner's knowledge that one of Kraus' other businesses was in Chapter 11 bankruptcy (Tr. 905-06). Petitioner stated that he never did anything to help Kraus or the flea market and he was never told that the money he received was for that purpose (Tr. 917-19).

The jury convicted Petitioner on all counts (R. 80). The trial judge sentenced Petitioner to a term of incarceration of eight years on Counts 2-7 to run concurrently with each other; a term of three years incarceration on counts 8-11 to run concurrently with each other and with the sentence on Counts 2-7; a term of eight years and a fine of $10,000 on Count 12, to run concurrently with the sentence on Counts 2-7 and Counts 8-11 (R. 98). Sentence on Count 1 was suspended and defendant was placed on five years probation on condition of performing 1,000 hours of community service, to run consecutively with sentences on Counts 2-7, 8-11 and 12 (R. 98). On appeal, the Court of Appeals affirmed Petitioner's convictions in all respects.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve the Uncertainty In Prosecutions for Extortion Under Color Of Official Right Concerning Whether the Government Must Prove that the Extortion "Victim" Believed That the Public Official Would Take Official Action In Exchange for Property

In affirming Petitioner's Hobbs Act conviction, the Seventh Circuit effectively ruled that the government need not prove that the alleged extortion "victim" actually believed that, in exchange for property, the public official would take or not take some action that the "victim" thought was within the scope of the official's duties. If allowed to stand, the Seventh Circuit's decision will create a dramatic distortion of the

"color of official right" element of the Hobbs Act (18 U.S.C. Section 1951) and an unwarranted expansion of federal criminal jurisdiction into purely local matters.

As precedent, the lower court's ruling will allow Hobbs Act convictions without any proof that the extortion "victim" even considered the public official's position in deciding to pay the official, much less that the payments were in exchange for the performance or non-performance of any acts that the "victim" thought were part of the official's duties. This Court should take the opportunity presented by Petitioner's case to clarify the proof requirements of the "color of official right" element of the Hobbs Act and resolve any doubt that the Hobbs Act requires proof of a direct, concrete connection between payments and an expectation that the public official will take or not take some action within the scope of his official duties.

In Petitioner's case, the goverment presented no evidence that Kraus, the extortion "victim," ever believed that, in exchange for Petitioner obtaining an interest in the flea market, Petitioner would take or not take some official action on Kraus' behalf. The evidence *not* in the record is as follows:

—Kraus never testified that he allowed Petitioner to invest in the flea market and made payments to Petitioner *because* Petitioner was a state senator;

—Kraus never testified that he believed that Petitioner's official duties as a state senator included any action that could benefit Kraus or the flea market;

—Kraus never testified that he asked Petitioner to do or not do anything that Kraus believed to be within the scope of Petitioner's official duties;

—Kraus never testified that he believed that Petitioner, because he was a state senator, could or would attempt to cause problems for the flea market; and

—Kraus never testified that he asked Petitioner to assist Kraus with problems relating to zoning, building codes, or traffic matters *because* he believed Petitioner's position as a state senator encompassed such matters.

The evidence in the record all demonstrates that Kraus' reasons for allowing Petitioner to invest in the flea market had nothing to do with Petitioner's position as a state senator, and that Kraus' dealings with Petitioner were not motivated by Petitioner's official position. Kraus testified that he never asked Petitioner to do anything connected with his job as a state senator (Tr. 579). Kraus testified that Petitioner's position as a state senator "never came up" in his dealings with Petitioner (Tr. 579). Moreover, Kraus stated that he did not believe that Petitioner and the other public officials could have closed down the flea market, even if they tried to do so, when Kraus stopped making distributions to the investors (Tr. 588).

Although Kraus testified that he wished to have the blessings of the neighborhood politicians before opening the flea market (Tr. 300), he never testified about any actions that Petitioner would take (that Kraus believed were within the scope of Petitioner's position as a neighborhood politician) that would benefit or harm the flea market. And, although Kraus claimed that he allowed Petitioner and the other public officials to invest in the flea market so that he would not have any problems in the ward when he opened the flea market (Tr. 303), Kraus never identified any problems that he believed Petitioner could cause due to Petitioner's position as state senator.

The government presented no evidence concerning a state senator's power over matters not within the scope of his official duties. The only evidence on that issue came from a defense witness, Illinois Senate President Phillip Rock, who agreed that state senators, by virtue of their official position, have a certain degree of power and influence over matters not directly within the scope of their duties (Tr. 1033). Senator

Rock also testified that state senators have nothing to do with flea markets, traffic or parking regulations, zoning, or building inspections (Tr. 1028-30).

Against this factual background, the Court of Appeals ruled that there was sufficient evidence to sustain Petitioner's Hobbs Act conviction. However, the lower court did not discuss any of the evidence or absence of evidence detailed above. Further, the Seventh Circuit did not identify a single scrap of evidence that supposedly supported its conclusion that Kraus believed that he was paying Petitioner in exchange for Petitioner's performance or non-performance of any act that Kraus believed to be within the scope of Petitioner's official duties as state senator.

The Seventh Circuit's ruling that sufficient evidence existed to prove extortion under color of official right effectively established that the government need not present any evidence concerning the relationship between the payments and an expectation of performance of official acts. That decision flatly conflicts with the accepted interpretations of the Hobbs Act from virtually every other federal circuit. Because the courts of appeal have not interpreted uniformly the "color of official right" element of the Hobbs Act, summaries of the various interpretations must be set out to provide an understanding of the deviation in Petitioner's case. Petitioner is confident, however, that this Court will see a consistent interpretation of the Hobbs Act in the decisions of other circuits, despite slight differences in wording, and will see the failure of the Seventh Circuit's ruling in the case at bar to conform to the interpretations of other courts.

The First Circuit, in *United States* v. *Bucci*, 839 F.2d 825, 828 (1st Cir. 1988), held that "the government need only show . . . that [the witness] held, and appellants exploited, a reasonable belief that [the public officials] . . . had the power to determine whether he would receive the contract award and subsequent payments under it." In *Bucci*, the government presented specific and detailed evidence concerning

the witness' belief that the defendants' positions as public officials included the power to affect the witness' business if he did not make payments to the public officials. *See id.*

In *United States* v. *Margiotta*, 688 F.2d 108, 133 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983), the Second Circuit stated that "a public official may be guilty of obtaining money under color of official right if the payments are motivated as a result of his exercise of the powers of his public office and he is aware of this fact." The Third Circuit made a similar ruling in *United States* v. *Mazzei*, 521 F.2d 639 (3d Cir.) (*en banc*), *cert. denied*, 423 U.S. 1014 (1975). In *Mazzei*, the Court stated:

> But in order to find that defendant acted "under color of official right," the jury need not have concluded that he had actual *de jure* power to secure grant of the lease so long as it found that Kelly held, and defendant exploited, a reasonable belief that the state system so operated that the power in fact of defendant's office included the effective authority to determine recipients of the state leases here involved.

Id. at 643.

The Fourth Circuit interpreted the "color of official right" element in *United States* v. *Paschall*, 772 F.2d 68 (4th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986). In *Paschall*, the Fourth Circuit held: "It is enough that the benefactor transfers something of significant value to the public official with the expectation that the public official will extend to him some benefit or refrain from some harmful action, and the public official accepts the thing of value knowing that it is being transferred to him because of his office." *Id.* at 71-72. In *United States* v. *Wright*, 797 F.2d 245, 250 (5th Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987), the Fifth Circuit stated: "A conviction under the Hobbs Act may be sustained by a finding that a public official has taken a fee, unlawfully, under color of his public office, in return for performance or nonperformance of an official act."

The Sixth Circuit, in *United States* v. *Bibby*, 752 F.2d 1116, 1127 (6th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986), cited and followed the interpretation from the Third Circuit's decision in *Mazzei*. The Court in *Bibby* also stated: "What the Hobbs Act proscribes is the taking of money by a public official in exchange for *specific* promises to do or refrain from doing *specific* things . . . . In other words, there must be a *quid pro quo*." *Id.* at 1127 n.1 (emphasis in original) (citation omitted).

The Seventh Circuit has interpreted the "color of official right" element of the Hobbs Act in several recent opinions. In *United States* v. *Garner*, 837 F.2d 1404, 1423 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 2022 (1988), the Court stated that the government proves a Hobbs Act violation by presenting evidence "that the defendants accepted payments knowing that the payments were motivated by a hope that they would influence the defendant in the exercise of his office." Similarly, in *United States* v. *Holzer*, 816 F.2d 304 (7th Cir.), *vacated and remanded on other grounds*, 108 S.Ct. 53 (1987), the Seventh Circuit stated: "In this Circuit it is extortion if the official knows that the bribe, gift, or other favor is motivated by a hope that it will influence him in the exercise of his office and if, knowing this, he accepts the bribe." 816 F.2d at 311; *see also United States* v. *Blackwood*, 768 F.2d 131, 134-36 (7th Cir.), *cert. denied*, 474 U.S. 1020 (1985).[6]

In *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979), the Eighth Circuit held that the Hobbs Act prohibits "the taking of money by a public official not due him or his office for the performance or non-performance of an official function." 583 F.2d at 1027; *see also United States* v. *Martin*, 751 F.2d 258 (8th Cir. 1984) (citing and following *Rabbitt*).

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[6] Although the lower court cited *Garner*, *Holzer*, and *Blackwood* in its discussion of the Hobbs Act, the lower court did not identify any evidence in the record that satisfied the proof requirements enunciated in those cases.

In *United States* v. *Aguon*, 851 F.2d 1158, 1161 (9th Cir. 1988), the Ninth Circuit, sitting *en banc*, approved a jury instruction that required the government "to prove that the defendant 'caused or attempted to cause another to part with money or property by threatening to withhold official action unless he did so.' " The Tenth Circuit, in *United States* v. *Hall*, 536 F.2d 313, 320 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976), stated: "It is sufficient that it is within his jurisdiction (the scope of his office) and that the victim has a reasonable belief that he does have the power. In turn, it is the exploitation of this belief that fulfills the requirement."

Finally, the Eleventh Circuit in *United States* v. *O'Keefe*, 825 F.2d 314, 319 (11th Cir. 1987), held that the government "must prove that the public official obtain property from another in exchange for performance of his official duties." In *O'Keefe*, the court of appeals affirmed the trial court's granting of the defendants' post-trial motions for judgment of acquittal because the government failed "to show that the $32,500.00 was received by Montgomery and O'Keefe in exchange for their vote on city matters. The government proved the votes and the payments, but the question remains whether the payment was for official acts or legitimate services to which the defendants were entitled compensation." *Id.* at 320. The Eleventh Circuit concluded that the government could not obtain a Hobbs Act conviction with little more than proof that the defendants were public officials and had received payments from the alleged extortion "victims." *See id.*

Even a brief review of the Hobbs Act decisions from other circuits makes clear that the lower court decision in Petitioner's case radically departed from the accepted proof requirements concerning "color of official right." In the case at bar, the Seventh Circuit held that the government had presented sufficient evidence to sustain Petitioner's Hobbs Act conviction, despite the fact that the record contained no evidence of Kraus' belief that Petitioner would take or not

take some action that Kraus believed to be within the scope of Petitioner's duties as a state senator. The evidence did not establish any relationship between the money Petitioner received and Kraus' expectations of any action Petitioner would take on his behalf. The evidence presented was no more adequate than the evidence in *O'Keefe*; the government proved that Petitioner was a public official and that he received money from Kraus, but little more. By its decision, the Seventh Circuit not only affirms a conviction on woefully inadequate evidence, but it establishes a dangerous precedent for future Hobbs Act prosecutions. This Court should grant Petitioner's writ and establish a uniform interpretation of the Hobbs Act to apply to all local public officials, regardless of the judicial circuit in which they serve. Obviously, if Petitioner had been a state senator in the Sixth, Eighth, or Eleventh Circuits, for example, he would not now stand convicted of violating the Hobbs Act. This Court should grant Petitioner's writ to prevent any further inequitable application of the Hobbs Act.

II. This Court Should Resolve The Split in The Circuits Over Whether the Hobbs Act Requires Proof That the Public Official Affirmatively Induced Payments from the Extortion "Victim"

This case gives this Court the opportunity to resolve a Hobbs Act issue that has caused a troubling and growing split in the circuits: whether a public official must affirmatively induce payments to violate the Hobbs Act. To put it another way, the issue is whether the Hobbs Act is violated where the public official does not solicit or seek payments, but merely accepts them with knowledge that his office provides the motivation for the payments.

Petitioner requested, and the trial court refused, a jury instruction that inducement is an element of a Hobbs Act prosecution (Tr. 1121-24; 1146-49). The trial court's ruling was in accord with previous Seventh Circuit decisions concerning inducement. *See, e.g., United States* v. *Garner*, 837

F.2d 1404, 1422 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 2022 (1988); *United States* v. *Holzer*, 816 F.2d 304, 311 (7th Cir.), *vacated and remanded on other grounds*, 108 S.Ct. 53 (1987); *United States* v. *Murphy*, 768 F.2d 1518, 1530 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986).

Petitioner did not raise the inducement issue before the Seventh Circuit precisely because that Court had so consistently rejected it in prior cases.[7] However, after Petitioner's appeal began before the lower court, the Ninth Circuit has joined the Second Circuit in ruling that the government must prove inducement in "color of official right" Hobbs Act prosecutions. In *United States* v. *Aguon*, 851 F.2d 1158 (9th Cir. 1988), the Ninth Circuit, sitting *en banc*, followed the decision in *United States* v. *O'Grady*, 742 F.2d 682 (2nd Cir. 1984) (en banc).[8] Thus, now two circuits, both in *en banc* decisions, have required the type of jury instruction rejected in Petitioner's case. This Court should no longer ignore the inducement requirement as one mandated by only a single circuit. The Ninth Circuit's decision in *Aguon* clearly signals a sincere split in the circuits concerning the interpretation of the Hobbs Act. Because the question of inducement frequently arises in prosecutions of public officials, as it did in Petitioner's case, this Court should grant Petitioner's writ and resolve this continuing split in the circuits.

---

[7] Other circuits have agreed with the Seventh Circuit that inducement is not an element of the Hobbs Act. *See, e.g., United States* v. *Spitler*, 800 F.2d 1267, 1274-75 (4th Cir. 1986); *United States* v. *Swift*, 732 F.2d 878, 880 (11th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); *United States* v. *Jannotti*, 673 F.2d 595 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982); *United States* v. *Butler*, 618 F.2d 411, 417-18 (6th Cir.), *cert. denied*, 447 U.S. 927 (1980).

[8] Although not addressing the issue as directly as in *Aguon* and *O'Grady*, the Fifth and Eighth Circuits have taken positions that are consistent with the interpretations in those cases. *See, e.g., United States* v. *Dozier*, 672 F.2d 531, 542 (5th Cir.), *cert. denied*, 459 U.S. 943 (1982); *United States* v. *Adcock*, 558 F.2d 397, 403 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977).

In *O'Grady*, the Second Circuit held that extortion does not occur "when a public official merely accepts unsolicited benefits knowing that they were given because of his public office." 742 F.2d at 684. The Second Circuit in *O'Grady* reversed the defendant's conviction for extortion because the trial court, like the trial court in this case, instructed the jury that a public official's mere acceptance of a benefit constituted extortion under color of official right if the official had knowledge that the payment to him was motivated by his public office. In that context, the court noted:

> The conduct proscribed by the Hobbs Act is the wrongful use of public office, not merely acceptance of benefits. Although receipt of benefits by a public official is a necessary element of the crime, there must also be proof that the public official did something, under color of his public office, to cause the giving of the benefits.

742 F.2d at 687.

In *Aguon*, the Ninth Circuit based its conclusion that the Hobbs Act requires proof of inducement on the grammatical construction of Section 1951, on the plain meaning of "induce," and on the legislative history of the Hobbs Act. The Court noted: "All definitions of 'induce' are active. Something is done. The payee must have done something to activate the payor." 851 F.2d at 1163. The Ninth Circuit also noted that the common law notions of extortion on which the Hobbs Act was based all included some active conduct by the "extortionist" in the form of a demand, solicitation, or request. *Id.* at 1163-66. Thus, the court concluded that "proof that the defendant 'induced' the improper payment is an essential element in the crime of extortion . . . ." *Id.* at 1166.

In addition to the statutory construction principles enunciated in *Aguon*, this Court also should accept the policy arguments set out in *O'Grady*. The Second Circuit observed that broader interpretations of extortion, such as by the Seventh

Circuit, have extended the Hobbs Act far beyond its intended reach:

> The federal courts have converted the crime from a narrow prohibition aimed at public officials who demand or receive a fee not due to them or their office, or who extort money by force or violence, into a broad license for "federal authorities to police influence pedaling in the political processes of the states."
>
> The practical effect of the district court's instruction is to further extend the reach of the statute and to impose upon all public officials an affirmative obligation not to accept benefits of any type or form. The statute is thus transformed from a vehicle to eradicate extortion and robbery in interstate commerce into a professional ethics standard governing public officials.

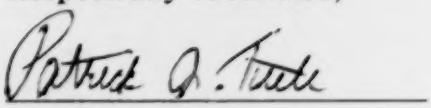
742 F.2d at 682; *cf. McNally* v. *United States*, ___ U.S. ___, 107 S.Ct. 2875, 2881 (1987) (intangible rights theory of mail fraud rejected in part because it "leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials").

It is obvious that there exists a clear and growing split in authority on a question of great significance among the circuit courts of appeal. This Court, therefore, should grant Petitioner's writ to resolve this important question concerning Hobbs Act prosecutions.

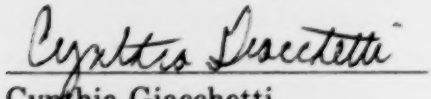
CONCLUSION

Wherefore, Petitioner respectfully prays that this Honorable Court grant this Petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

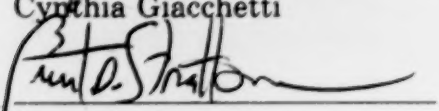
Respectfully submitted,



Patrick A. Tuite



Cynthia Giacchetti



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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-2776

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWARD NEDZA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 CR 180—Ann Claire Williams, *Judge.*

ARGUED APRIL 7, 1988—DECIDED JULY 12, 1989

Before BAUER, *Chief Judge*, COFFEY, and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* Edward Nedza appeals his criminal conviction, following a jury trial, of one count of racketeering, one count of conspiracy to commit extortion, six counts of Hobbs Act extortion, a forfeiture judgment of $10,740, and four counts of filing false tax returns. We affirm.

I.

Factual Background

The following facts were adduced at trial. Early in 1980, businessman Leonard Kraus and his brother, Norman Kraus, planned to open a flea market on property they owned in

Chicago's 31st Ward. Knowing of no other flea market operations within the city, Leonard Kraus ("Kraus") decided to "seek the blessings of the neighborhood politicians" before starting the business.

Kraus arranged to meet with Benedict "Sparky" Garmisa, the State Representative for the 31st Ward. He told Garmisa about the prospective venture and asked him whether it would be "all right with the powers to be" in the neighborhood. Kraus sought reassurance that "he wouldn't have any problems after [he] opened it up, because it was something that really wasn't tried in the City of Chicago." Garmisa replied that he would talk to Ed Nedza (the defendant) and Chester Kuta about it and get back to Kraus.[1] Garmisa told Kraus that he wanted to invest in the enterprise. When Kraus responded that he and his brother did not need any investors, Garmisa replied, "Well, we'll talk about it further."

Two weeks later, Garmisa informed Kraus that he had discussed the flea market operation with Nedza and Kuta, and that it seemed acceptable to them. Garmisa advised Kraus to consider making Nedza and him partners in the business. Kraus emphasized that he did not need additional money or partners to which Garmisa responded, "Well, why don't we talk about it later."

Kraus and his brother discussed the demand by Garmisa and Nedza and decided to make a token offer to them to prevent any problems in the ward. Kraus subsequently met with Nedza and Garmisa and offered them twenty percent of the stock. Nedza and Garmisa rejected this offer as "unacceptable" and asked for fifty percent. Kraus explained that he and his brother had never had a fifty percent partner in any of their business ventures, and that they wanted to control the flea market. Nedza and Garmisa again stated that

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[1] At the time, Nedza was a state senator from the district encompassing Chicago's 31st Ward as well as the Democratic Ward Committeeman for the 31st Ward; Kuta was the 31st Ward Alderman.

this was unacceptable. At that point, Kraus concluded the meeting, telling Nedza and Garmisa that he would get back to them later. After another week or so, Kraus visited Garmisa to tell him that he and his brother had decided to let Garmisa and Nedza invest in fifty percent of the business.

The specific terms of the agreement were ironed out at the next meeting. Nedza and Garmisa were to invest a combined total of $10,000 as were Kraus and his brother. Nedza and Garmisa informed Kraus that Kuta would share a portion of their (Nedza and Garmisa) fifty percent interest in the business. Nedza and Garmisa assured Kraus that they would take care of any problems he encountered in the ward, and that Kuta would act in their stead whenever Nedza and Garmisa were out of town. As a final point, Garmisa indicated that their (Nedza and Garmisa) investments would not be recorded in their names, but in the names of relatives.

Nedza and Garmisa each invested $4,000; Kuta paid in $2,000. The subscription agreement for the flea market indicates that $200 of Nedza's $4,000 payment went to the purchase of 200 shares of stock; the remainder ($3,800) was recorded as a loan. Nedza's stock was listed in his wife's name, and Garmisa and Kuta each had his stock issued in a daughter's name.[2]

Nedza, Garmisa and Kuta told Kraus that they expected him to make periodic payments in cash, beginning in 1981. That year, Nedza received the first payments from the flea market; six of the checks (totalling $1,280) were designated as repayment of the loan.

From time to time, each of the officials would call Kraus and demand money. After these calls, Kraus would examine the company's records and decide whether payments could be made, and in what amount. He would then stuff cash into three white envelopes and distribute them to each of the

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[2] In fact, none of the public official's names can be found in any of the flea market's business records.

officials. These payments were never recorded in the flea market's books, although Kraus kept his own personal record of payments.[3] Nedza did not report these payments in his 1981 and 1982 tax returns, even though they were income. Nedza also failed to mention the payments or the interest in the flea market in his ethics statements for any year.

During the same time frame in which he was making payments to the officials, Kraus requested assistance with several problems that arose in connection with the flea market. For example, in September 1981, Kraus received notice from the Chicago Bureau of Fire Prevention that the flea market could not continue to operate at its location. Kraus immediately called Garmisa who said he would "get in touch with Nedza and that he [Nedza] would take care of it." When Kraus received another notice from the Fire Prevention Bureau a month or two later, he called the fire department himself and resolved the problem by making certain repairs.

In 1981, Kraus requested that the timing of a stoplight located near the flea market be changed for weekends.[4] Kraus was also interested in removing the no-parking signs on a street bordering the flea market. Kraus asked that Nedza,

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[3] The following payments were listed for Nedza:

1981	
April 21	$ 940
November 17	$2,400
	$3,340
1982	
February 16	$1,000
May 16	$1,400
June 7	$1,000
July 14	$1,000
August 16	$1,000
September 13	$1,000
October 13	$1,000
	$7,400

[4] Nedza said that he would take care of this request. The parties are in disagreement as to whether, in fact, the timing of the light had been changed due to Nedza's intervention.

Garmisa and Kuta look into the matter; despite his request, the no-parking signs were never removed.

In late 1981, Kraus encountered problems with electrical inspectors; the inspectors told Kraus that all of the electricity at the flea market had to be changed within a month. Kraus contacted Garmisa who promised to take care of it. Kraus also spoke to Nedza, Garmisa, and Kuta about the problem at a meeting; the officials agreed to intervene. Kraus later met with Nedza at Nedza's office in the Streets and Sanitation Department at City Hall to determine how to obtain a permit for the required electrical work. Nedza telephoned someone at the Electrical Department to assist Kraus and, when the departmental worker came to his office, Nedza instructed him to take Kraus upstairs and "see what you can do for him." Even though the worker did so, Kraus was still unable to secure the permit.

Kraus subsequently discovered that he could not obtain the permit because the flea market was not properly zoned. Kraus complained to Nedza, Garmisa and Kuta that he had spent a lot of money to satisfy fire department regulations only to learn that the electrical problems could not be fixed due to zoning regulations. Kraus was particularly troubled since he had expected the officials to have known about zoning. He asked the three to check into the problem immediately.

Nothing further transpired, however, and in late 1982, Kraus ceased making cash payments to the officials. At about the same time, Kraus met with businessman James Allenson; Kraus paid Allenson $8,500 to resolve the electrical problems.[5]

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[5] Kraus later learned that a portion of this money went to a Consumer Services Inspector. To solve the zoning problem, Allenson introduced Kraus to Victor Albanese; Kraus paid Albanese $16,000 to obtain the desired zoning change. Some of this money ($1,000) went to an alderman (not Kuta) who had opposed the zoning change; another portion reportedly was given to a judge.

In 1983 and 1984, the repairs to the flea market were either underway or almost complete, and Garmisa and Kuta were no longer public officials. Nonetheless, Nedza, Garmisa and Kuta continued to demand money from Kraus. At a meeting held in 1983, they asked Kraus why he no longer made the cash payments. Kraus told them that he was being "killed here with paying all this money and I'm not getting anything done." Kraus indicated that he would pay no more money until all the work was completed.

In 1984, Garmisa set up a meeting with himself, Nedza, Kuta and Kraus to discuss the financial records of the flea market. At the meeting, Garmisa again complained to Kraus about the absence of payments. Kraus insisted that he had discontinued the payments due to overwhelming expenses. The four then discussed the possibility of a buy-out; Kraus was informed that he should pay, in addition to repayment of the outstanding loan amounts, $30,000 each to Nedza and Garmisa for their stock, and $15,000 to Kuta. When Kraus protested, the price was negotiated down to $12,000 each for Nedza and Garmisa and $6,000 for Kuta, plus repayment of the loans. Shortly after the meeting, the parties signed agreements to this effect.[6] From February 1985 until November 1986, Nedza received a series of checks from Kraus and his brother for a total of $11,000.

On April 15, 1985, Nedza and Kraus met at a health club and, unbeknownst to Nedza, Kraus tape-recorded their conversation.[7] Nedza expressed concern over what Kuta might do. Nedza also worried about how he could explain the failure to report the cash payments in his tax returns.[8]

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[6] In accordance with other documentation, the buy-out agreements were executed in the names of their relatives.

[7] After learning that Allenson had recorded their conversation regarding the money Kraus had given to him to resolve the electrical problems, Kraus decided to cooperate with the government.

[8] Nedza proposed to shield the purpose of the payments:

(footnote continues)

In a superseding indictment issued on July 13, 1987, Nedza was charged with one count of conspiracy to commit extortion in violation of 18 U.S.C. § 1951 (Count 1), six counts of Hobbs Act extortion under 18 U.S.C. § 1951 (Counts 2 through 7), four counts of filing false tax returns for 1981 and 1982 under 26 U.S.C. § 7206(1) (Counts 8 through 10), and one count of racketeering including a forfeiture charge under 18 U.S.C. § 1962(c) (Count 12).[9] Nedza's trial began on August 4, 1987.

At trial, Leonard Kraus appeared as the government's main witness. Kraus reported how the officials' investment scheme had developed. He also described how the payouts to the officials had been made.

Joanne Nedza, the defendant's wife, testified that the flea market stock had been put in her name because her husband traveled a lot and they were concerned that, if anything were to happen to him, she would be able to receive income without going to court. She conceded that all of their previous investments had been held in joint custody in both of their names. She also admitted that she and the defendant had realized a profit from the business in 1981 and 1982.

(footnote continued)

> Oh, the only, the only thing the first thing that thought that comes in my mind . . . is, uh . . . file an amended tax return . . . by complete ignorance. The consummation of it [the buy-out] was last month and we didn't receive any money until this year, so it would have been this year that I would have mistaken it but then . . . filing an amended tax return. Um . . . uh, I would just, you know can't put previous payments.

In 1986, after he had been interviewed by federal agents, Nedza filed amended tax returns for 1981 and 1982.

[9] In the same indictment, Chester Kuta was charged with filing a false tax return in 1982 and with depriving Kraus of property without due process of law in violation of 18 U.S.C. § 242; Leonard Kraus was charged with two counts of failing to file tax returns in violation of 26 U.S.C. § 7203. Both Kuta and Kraus pleaded guilty. Garmisa died prior to the return of the indictment against him.

Nedza took the stand and explained that he had been introduced to Kraus by Garmisa and that Garmisa had told him that Kraus was seeking outside investors for the flea market. Nedza contended that the payments had been made in cash as a convenience to Kraus, and that he had not reported the payments on his tax returns because of his belief that the business was organized as a Subchapter S corporation. Nedza conceded that he had no knowledge of the tax aspects of a Subchapter S corporation, and that he had not discussed the matter with his accountant.

Nedza claimed that he first learned that the business was not organized as a Subchapter S corporation when he signed the buy-out agreement. He also stated that he did not know that a portion of his investment was listed as a loan. He testified that he had no idea how well the flea market had been doing since he had not seen a financial statement since 1982, nor had he ever seen a tax return for the business. As for the tape-recorded conversations, Nedza explained that he had been hoping to seek re-election, and his comments merely reflected his concern that Kuta might embarrass him politically be revealing that Nedza had failed to report income on his tax returns.

Nedza also denied helping Kraus with problems that arose in the flea market's operation. He testified that in his role as Illinois senator, he had nothing to do with Chicago parking signs, traffic lights, building inspections, fire or electrical inspections, zoning issues, or flea markets. However, Illinois Senate President Phillip J. Rock testified that senators do exert power over matters not directly related to their official duties.

The jury convicted Nedza on all counts. The court sentenced him to eight years' imprisonment on Counts 2 through 7, three years' imprisonment on Counts 8 through 11, eight years' imprisonment and a fine of $10,000 on Count 12; all of these sentences run concurrently. The court suspended sentence on Count 1, placing Nedza on five years' probation

consecutive to his incarceration; Nedza's probation is conditioned on his performing 1,000 hours of community service. His post-trial motions for relief were denied on October 21, 1987, and this appeal followed.

II

Analysis

On appeal, Nedza contends that the district court erred in several respects. He urges that there was insufficient evidence to convict him of extortion and conspiracy to extort; he contends that the lack of proof of the extortion and bribery charges (the predicate acts for RICO count) invalidates his conviction for racketeering.[10] He also charges that the district court improperly limited the scope of his cross-examination of Kraus, and that the court abused its discretion in refusing to admit witnesses who would have discredited Kraus' testimony. We will examine each of these arguments in turn.

A.

Sufficiency of the EvidenceNedza argues that the government failed to establish beyond a reasonable doubt that he conspired to and did commit extortion, and that his acts violated RICO. A jury verdict will be upheld if, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found against the defendant. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Whaley*, 830 F.2d 1469, 1472 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1738 (1988).

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[10] Nedza asks for reversal of his convictions on all counts. However, he makes no argument with respect to his convictions for tax fraud, except to the extent that he challenges the court's failure to admit certain evidence purporting to show self-dealing by Kraus. This argument does not refute the evidence underlying the tax fraud counts. Accordingly, we will not discuss the sufficiency of the evidence underlying these charges.

1.

Hobbs Act ViolationsNedza's convictions for conspiracy to extort and Hobbs Act extortion, in violation of 18 U.S.C. § 1951, must stand if the evidence indicates that the funds were obtained from Kraus through wrongful use of fear and under color of official right.[11] The first type of inducement is based on the fear that the official will wield his official powers against the payee, whereas the second is founded on a hope of benefit from the exercise of the official's influence. *United States v. Holzer*, 816 F.2d 304, 310 (7th Cir.), *vacated and remanded on other grounds*, 108 S. Ct. 53 (1987). Nedza asserts that the evidence is insufficient to hold him to either of these prongs.

a. Wrongful Use of Fear

"[E]xtortion by wrongful use of fear of economic harm is established by showing that the defendant preyed upon or exploited the victim's fear of econominc harm." *United States v. Lisinski*, 728 F.2d 887, 890 (7th Cir.), *cert. denied*, 469 U.S. 832 (1984); *United States v. Margiotta*, 688 F.2d 108, 134 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). We conclude that this standard has been satisfied here.

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[11] The statute provides that

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951.

Nedza charges that no direct evidence of a threat by Nedza had been shown. However, the evidence need not demonstrate that either a direct or indirect threat has been made, *Lisinski*, 728 F.2d at 889-91, nor is it necessary to show that the official made a specific demand for payment on threat of a specific sanction. *United States v. Murphy*, 768 F.2d 1518, 1530 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986).

As stated in *Holzer*, 816 F.2d at 310, "[a] threat is not a state of mind in the threatener; it is an appearance to the victim," so long as the victim's conclusion is reasonable. In this case, Kraus testified that he and his brother had not had outside investors in their previous business ventures, and that, at first, they had planned only to allow for a token investment by the officials. Kraus further stated that he accepted Garmisa, Nedza and Kuta as investors in the enterprise under fear of reprisal. The jury believed Kraus, and we will not disturb their credibility finding. *See United States v. Garner*, 837 F.2d 1404, 1423 (7th Cir. 1987) (credibility findings are within the province of the jury), *cert. denied*, 108 S. Ct. 2022 (1988).

b. Color of Official Right

We next examine Nedza's contention that the evidence was insufficient to show that extortion occurred under color of official right.[12] Nedza makes several arguments on this point. He first insists that Kraus was unreasonable in believing that as a state senator, Nedza had the ability to impact a local business. However, *de jure* ability to perform the promised acts is not required. *United States v. Blackwood*, 768 F.2d 131, 134-35 (7th Cir.), *cert. denied*, 474 U.S. 1020 (1985); *see also United States v. Rindone*, 631 F.2d 491, 495 (7th Cir. 1980)

[12] The government does not rely on Nedza's status as a 31st Ward Committeeman as the basis for his misuse of office, but on Nedza's position as an Illinois state senator.

(per curiam) (it is "immaterial whether the questioned transaction involves a promise by the official to undertake acts unrelated to his duties"). Furthermore, Senator Rock testified that state senators exercise enormous influence in areas outside the scope of their traditional duties.

As a second point, Nedza maintains that the evidence did not establish a reasonable belief that he could influence activities in the 31st Ward on behalf of the flea market. As proof that his office was not compromised, Nedza points to the fact that many of his interventions were unsuccessful. We note, however, that a Hobbs Act violation is complete at the time "one attempts to induce a victim engaged in interstate commerce to part with property." *United States v. Hocking*, 860 F.2d 769, 777 (7th Cir. 1988) (citing *Rindone*, 631 F.2d at 493). Indeed, the issue is not whether the extortionist is ultimately effective. Rather, the point is whether Kraus would have reasonably believed, *at the time of the extortionate act*, that Nedza could deliver the power of his office for the victim's benefit. *See Blackwood*, 768 F.2d at 134-35; *United States v. Mazzei*, 521 F.2d 639, 643 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975).[13]

Finally, Nedza cites *United States v. Hedman*, 630 F.2d 1184, 1195 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), for its language that in a Hobbs Act case, the government must prove that a public official obtained money "to which he was not entitled and which he obtained only because of his official position." *See also United States v. O'Keefe*, 825 F.2d 314, 320 (11th Cir. 1987). Since the flea market was a legitimate business enterprise, Nedza argues, the funds he received stemmed from his business investment, and not from any

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[13] Wrongful use of office does not mean that the wrongdoer had to agree to perform a specific official act in exchange for a benefit; rather, extortion is committed if the official accepts the favor, knowing that it is motivated by a hope of influence. *Garner*, 837 F.2d at 1422 (citing *Holzer*, 816 F.2d at 310). Thus, Nedza's focus on his inability to secure an electrical permit or to change the parking conditions at the flea market is misplaced.

illegal purpose. This contention ignores the observation of *Hedman* that it is the motivation for the payment which dictates whether the conduct falls within the Hobbs Act. *Hedman*, 630 F.2d at 1195 (citing *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied sub nom. Barry v. United States*, 421 U.S. 910 (1975)).

Moreover, the evidence adduced at trial belies Nedza's assertion that the transaction was merely a legitimate business investment entered into by several public officials. The questionable nature of the payments and the failure to list the defendant and the others on the corporate books supports the jury's conclusion that an extortionate act occurred.

In sum, we conclude that there was sufficient evidence to support Nedza's convictions for conspiracy to commit extortion and extortion.

2. RICO Violation

Nedza was also convicted of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c).[14] Nedza maintains that since there was inadequate evidence to convict him of extortion or bribery, there was no predicate act to support the racketeering charge and the forfeiture. We have already determined that Nedza committed extortion, and so this contention has no merit.

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[14] The statute provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1982(c).

B. Evidentiary Rulings

Nedza complains that several of the district court's evidentiary rulings were in error. We review a trial court's rulings concerning the admission and exclusion of evidence under the abuse of discretion standard. *United States v. Wellman*, 830 F.2d 1453, 1465 (7th Cir. 1987); *Webb v. City of Chester*, 813 F.2d 824, 827 (7th Cir. 1987).

Nedza contends that the court's limitation on the cross-examination of Kraus prevented him from exposing Kraus' motive to fabricate. For example, Nedza charges that Kraus took substantial funds from the flea market without the investors' knowledge. Therefore, Nedza claims, it was in Kraus' best interest to depict Nedza's interest in the business as extortionate in order to insulate himself from a shareholder's derivative suit. He also claims that had the jury heard how much Kraus gained from the buy-out (by buying back the shares at a cost well below market value), Kraus' entire version of events would have been considered implausible. Nedza complains that the district court erred in restricting cross-examination on Kraus' drawing of funds and in refusing to admit testimony of Kraus' self-dealing.

We see no abuse of discretion in the court's exclusion of testimony concerning Kraus' self-dealing. At best, the testimony would have suggested that Kraus lied in order to avoid a civil suit, not criminal liability for his acts. Moreover, the jury was presented with ample evidence of Kraus' business transactions. For example, Nedza questioned Kraus on the amount of salary he drew and the amount of payments that had been made to a realty company owned by Kraus.

As for the decision to restrict cross-examination and to exclude expert testimony concerning the valuation of the flea market shares at the time of the buy-out, we conclude that the court properly ruled. This information was presented to the jury. Defense counsel was able to question Kraus about

the estimated worth of the flea market at the time of the buy-out, as well as the amount paid to Garmisa, Kuta and Nedza.

Nedza also objects to the district court's preclusion of cross-examination of Kraus concerning certain payments that Kraus made to other officials for matters outside of the flea market operation. The court allowed defense counsel to question Kraus about the payments he made to Allenson for matters relating to the flea market. We agree with the district court that Kraus' payments to officials concerning other business ventures had no relevancy to the present case.

Next, Nedza charges that he was unable to question Kraus on why he failed to report the extortion plot to the government, even though his brother had cooperated in a federal extortion case in 1980. This line of questioning, Nedza argues, would have validated his argument that the enterprise was legitimate—Kraus failed to report because there was no wrongdoing to report. The record reveals that the defense counsel asked Kraus whether he knew how to report extortion to the proper authorities. Thus, we see no error on this ground.

We also conclude that the court properly refused the testimony of Barbara Nudelman, an "anti-character" witness, who would have spoken of Kraus' poor reputation for truthtelling. Nudelman had attended high school with Kraus; at the time of trial, Kraus was about 57 years of age. During voir dire, Nudelman explained that her knowledge of Kraus' reputation derived from discussing Kraus with former classmates on two occasions. The first discussion occurred at a picnic in June 1986, whereas the second took place about two months prior to trial. However, the classmate with whom she spoke on the latter occasion had not seen Kraus for almost a year. The court thus determined that the basis for Nudelman's testimony as to Kraus' reputation in the community was inadequate, as well as too remote in time. We agree with this assessment.

Nedza now insists that Nudelman was presented to offer her personal opinion of Kraus, and that personal opinion testimony does not require recent contact. However, as the government points out, the defendent introduced Nudelman as a reputation witness. Therefore, the district court had no reason to determine whether Nudelman could properly testify as an opinion witness. Accordingly, Nedza cannot now claim error.

III.

We hold that there was sufficient evidence to support Nedza's convictions, and that the district court did not abuse its discretion with respect to its evidentiary rulings. For these reasons, we affirm Nedza's convictions.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit